No. 02-603

IN THE

Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, ET AL.,
Petitioners,

v.

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence supported the properly instructed jury's verdict that an admitted monopolist violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by, among other things, systematically removing and destroying hundreds of thousands of competitors' display racks, "point of sale" advertising, and products, and entering into more than twenty thousand contracts that prevented stores from displaying or advertising competitors' products, where the evidence showed that this exclusionary conduct led to higher prices and fewer choices for consumers and where the monopolist conceded that the conduct had no legitimate business purpose.

2. Whether sufficient evidence supported the properly instructed jury's award of $350 million in damages for an admitted monopolist's systematic and successful multi-year campaign to "eliminate competitive distribution" and thereby to preserve "the highest profit margin of any public company," where testimony from multiple witnesses (most of whom were unchallenged by the monopolist) estimated damages between $313 and $488 million.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondents Conwood Company, L.P., and Conwood Sales Company, L.P., are neither publicly traded companies nor subsidiaries or affiliates of a publicly owned corporation.

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INTRODUCTION

The petition presents only a challenge to the sufficiency of the evidence. USTC does not allege here a single error of law in the month-long trial: no error in the jury instructions – which USTC approved; no error in the admission or exclusion of evidence; and no claim that USTC was restrained in any way from challenging Conwood's witnesses or arguing its version of the facts to the jury. USTC concedes, moreover, that the jury properly found that moist snuff constitutes the relevant market and that USTC, with 77 percent of that market at the time of trial, was a monopolist with the power to raise prices, restrict output, and exclude competition.

The sole basis for USTC's petition is its claim that the evidence – consisting of 66 witnesses and 364 representative documents – was insufficient as a matter of law to support the jury's findings that USTC illegally maintained its monopoly through exclusionary conduct and that Conwood suffered damages thereby of $350 million. The court below carefully reviewed the voluminous trial record and concluded that there was "ample documentary and testimonial evidence" to support the judgment. Pet. App. 30a. This Court does not sit to reweigh evidence that two lower courts have already found sufficient. As to damages, USTC concedes that the jury was properly instructed that it could only find damages due to USTC's antitrust violation. The jury's award was supported by extensive evidence, from varied sources, which USTC admits that the jury could properly consider and which it does not challenge here.

USTC asserts as many as 10 "conflicts" on myriad issues, but the Sixth Circuit itself perceived no conflict with any other court on any issue, and for good reason. The cases that USTC cites as supposedly in "conflict" all involved the application of settled legal principles to completely different factual situations.

STATEMENT

1. For almost a century, USTC was the only U.S. producer of moist snuff. Pet. App. 4a. Respondent Conwood entered the market in the late 1970s and made some initial inroads on USTC's monopoly market share. *Id.* But by the mid-1990s, Conwood's growth had been stopped at approximately 13½ percent. The only other two companies in the market, Swedish Match and Swisher International Group, had shares of 6 and 4 percent, respectively, and were likewise stymied in their efforts to grow. *Id.*

USTC raised its prices approximately 8-10 percent per year between 1979 and 1998. *Id.* at 5a. In 1999, USTC earned nearly $1 billion in profits from its moist snuff business and had "the highest profit margin of any public company in the country." *Id.* at 4a. Yet there was no new market entrant after 1990, and USTC still controlled 77 percent of the market in 1999. *Id.* at 5a. As Professor Kamien of Northwestern University's Kellogg Graduate School of Business explained, only a monopolist exercising market power can maintain such huge profit margins and impose such consistent price increases (at more than double the rate of inflation), while forestalling entry and maintaining such a large market share. Trial Tr. 609-10.

2. Conwood brought this suit against USTC for, *inter alia*, illegal maintenance of monopoly and attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The trial evidence established that:

Beginning in the early 1990s, USTC perceived a threat to its monopoly from the innovative products, packaging, and accelerated marketing efforts of Conwood, Swedish Match, and Swisher. USTC's concerns were intensified when, in the mid-1990s, Conwood and Swedish Match introduced "price value" or half-priced brands of moist snuff. USTC believed that competition, and particularly price-value competition, was likely to erode its profits.

USTC recognized that it could compete on price and quality. "If we were willing to lower our margins and reduce prices, we could stop the segment share erosion. But

this will create other issues." C.A. App. 2536 (USTC Strategic Plan). Specifically, USTC feared that if it reduced prices its shareholders would flee the stock as shareholders had fled Phillip Morris when it had embarked on a price war (and produced a dramatic decline in its stock price that became known as "Marlboro Friday"). *See id.* at 2535. USTC thus decided not to compete on price. On quality, too, USTC offered nothing new. Its president testified that USTC did not make a single product improvement of any kind, or provide any additional value to the consumer, in the 10 years preceding trial. *Id.* at 875.

Rather than compete on the merits, USTC decided to exercise its "market power" and "[p]rotect [its] market share by creating barriers to competition." *Id.* at 2492 (Steering Committee Outline). *See id.* at 2499 ("UST does not 'deal' on its product's prices, we don't have to."). USTC's senior executives chose to embark on a multifaceted campaign "to exclude competition from the moist snuff market." Pet. App. 22a.

Legal restrictions severely limit the opportunities for tobacco companies to advertise their products. Accordingly, USTC focused its exclusionary efforts on the point of sale, where moist snuff manufacturers can advertise their wares and alert customers to new product introductions and price promotions. Normally, each manufacturer is allowed by the retail store to place its own rack, with its own "header card" advertising affixed, and gravity-fed slots (called "facings") from which consumers can select a can. "[T]he point at which the buyer makes his purchase decision is the optimal time to convince the buyer to purchase a particular brand of moist snuff." *Id.* at 5a. If the manufacturer is unable to advertise or display its products and price promotions on a rack at the point of sale, it loses the opportunity to compete for the customer's business. *See id.* at 5a-6a.

USTC accordingly used its market power in a number of inter-dependent ways to exclude from stores its competitors' display racks, "point of sale" ("POS") advertising,

and products. For example, USTC sales representatives, while making their sales rounds, "would routinely discard hundreds of thousands of Conwood racks and their accompanying POS." *Id.* at 12a. Conwood's Chairman, William Rosson, testified that Conwood "spent $100,000 a month on replacement racks," *id.*, which represented some 20,000 racks per month. "[A]bout 50 percent of sales representatives' staff time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks." *Id.* at 13a. Numerous USTC witnesses admitted that "they removed racks and POS materials without retailer authorization." *Id.* at 15a.

USTC also established a so-called Consumer Alliance Program ("CAP"), which provided inducements for retailers to exclude rival racks, advertising, and products. USTC itself described CAP as "a great incentive . . . for the elimination of competitive products." C.A. App. 2620. "USTC was able to sign 37,000 retailers to the CAP, which represents 80 percent of its overall volume in moist snuff sales." Pet. App. 12a. With more than 21,000 of the most significant retailers, moreover, USTC had express "exclusive vending" contracts that prevented those stores from having any competitors' display racks or POS advertising. C.A. App. 1273-74.

USTC's monopoly power also made it the only plausible candidate to serve in the role of "category manager" for moist snuff. In this capacity, USTC had substantial control over how retailers used store space to display moist snuff and hence USTC could determine whether and how the different brands of moist snuff were displayed. Pet. App. 10a-11a. There was ample space in stores for the small, but highly profitable moist snuff cans; indeed, stores had ample room to stock, and did stock, the far bulkier and less profitable packs of loose leaf tobacco sold by Conwood and others (but not USTC). But USTC

abused its market power by artificially constraining space available to rival moist snuff and by "deliberately provid[ing] false information to stores to exclude competitors from the market." *Id.* at 8a.[1] In particular, USTC sought to "control the number of Price Value product introductions," C.A. App. 2486, and "control the merchandising and the P.O.S. placements, which will make the consumer awareness of the price differential difficult," *id.* at 2656. For USTC, it was "imperative that we continue with this [c]ategory [m]anagement action plan to eliminate competitive products." *Id.* at 2561.

USTC's high-level corporate documents confirmed that USTC planned to "eliminat[e] competitive distribution" through systematic removal of competitors' racks, POS, and facings; implemented that plan through its sales force; monitored progress through periodic reviews of market conditions and annual reviews of salesmen; and tabulated success throughout the United States. Conwood C.A. Br. 17-18 (citing 55 trial exhibits); *see also* Pet. App. 26a (noting that "[m]uch of the evidence Conwood highlights was documentary").

At trial, USTC did not attempt to defend any of these tactics as demand-enhancing or otherwise procompetitive. USTC senior executives readily admitted that there was no shortage of shelf space in the stores and that under ordinary competitive conditions each manufacturer would be permitted to place its own racks and POS advertising in the stores. The executives also admitted that excluding – or inducing stores to exclude – another competitor's products, racks, or POS would be wrong and harmful to competition. *See, e.g.*, C.A. App. 381-85, 392-95, 403-04, 858-59, 879-80, 968. USTC's executives in-

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[1] *See, e.g.*, C.A. App. 2189 (USTC training document showing how to create false impression about rival sales); *id.* at 703 (testimony that USTC sought to constrain space for competitors' products even though there was room for multiple racks); *id.* at 745 (testimony that USTC sought to control a greater percentage of facings to exclude rival products, even though USTC had "plenty of room" to sell its products).

stead claimed that the company did not engage in the types of conduct alleged by Conwood, and that stores excluded Conwood without any prompting from USTC. *See, e.g., id.* at 84-85, 904-06. The jury found otherwise.

The jury also found that USTC's exclusionary conduct harmed competition by leading to higher prices and fewer choices for consumers. Pet. App. 11a (citing evidence "that USTC's conduct harmed consumers by limiting variety and raising prices"); *id.* (citing regression analysis demonstrating that, "for every 10 percent increase in USTC facings, retail prices for moist snuff rose by $.07"); C.A. App. 2762-63 (chart showing that moist snuff output declined where USTC was able to eliminate rival POS advertising and facings).

The district court heard evidence on Conwood's damages from several different sources. Conwood's national sales manager, Terry Williams, compared the markets where USTC had rack exclusivity, which produced a market share for Conwood "below its national average," with markets where it did not have such exclusivity. Pet. App. 43a. The evidence showed that, "in unimpeded competition, Conwood's market share would have been approximately 25 percent instead of 13.5 percent nationally." *Id.* at 16a. This evidence was confirmed by a number of USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising had not been excluded, Conwood's share was around 25 percent. *See, e.g.*, C.A. App. 1787, 1795-97, 1874, 1995.

Conwood's Chairman William Rosson testified that, "had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent." Pet. App. 15a. This testimony was supported by uncontested evidence that Conwood had rapidly gained market share before USTC began its exclusionary campaign; its approximately 40-percent market share in the most closely related market – loose leaf – where USTC did not offer a product; and by Conwood's performance in moist snuff markets where USTC's tactics

were less effective. It was undisputed that "each additional point (one percent) of market share translates into approximately $10 million in annual profits." *Id.* Thus, testimony that Conwood lost 10 percent in national market share supported damages, for the four years preceding trial, of approximately $400 million in lost profits.

Rosson also testified that he had long noted a pattern in Conwood's growth: "[i]n places where [Conwood] had a 'foothold,' i.e., a relatively high market share in a given area, it saw its market share increase during the 1990s to a market share above 20 percent." *Id.* In places where Conwood did not have a foothold market share – a share large enough to ensure that customers would complain of Conwood's exclusion and retailers would have incentive to resist – USTC's tactics prevented Conwood from increasing its market share.

Professor Richard Leftwich of the University of Chicago Graduate School of Business, "who is recognized as an expert on business valuation and lost profits," "tested Rosson's hypothesis." *Id.* at 16a. "Using a regression analysis, Leftwich found a statistically significant difference between states in which Conwood had a foothold and those in which it did not." *Id.* Leftwich first determined that, "in states where Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an additional 8.1 percent from 1990 to 1997." *Id.* "'In contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little.'" *Id.* at 16a-17a (quoting district court decision). Leftwich then "considered other factors to rule out the possibility that [the] statistical relationship [he found] was caused by factors other than USTC's conduct." C.A. App. 88 (district court motion in limine opinion). Leftwich examined all possible alternative explanations for which data were available, including every possibility that USTC's expert suggested, and found that no other factor besides USTC's exclusionary conduct could explain

Conwood's stunted growth in non-foothold states. *Id.* at 1104, 1111.

Leftwich accordingly determined that Conwood's low market growth was due to USTC's exclusionary conduct and that "increases in USTC's exclusionary behavior in a state reduced Conwood's share of sales by a statistically significant amount." Pet. App. 17a. Leftwich assessed Conwood's damages from USTC's actions to be in a range from $313 million to $488 million. *Id.* USTC offered no evidence on the amount of Conwood's damages and claimed only that Conwood had sustained no damages. The jury awarded damages of $350 million. *Id.* After statutory trebling, the court entered judgment for Conwood in the amount of $1.05 billion. *Id.* at 48a.

3. On appeal, "USTC d[id] not challenge that it has monopoly power; nor [wa]s there an issue as to the relevant product (moist snuff) and geographic markets (nationwide)." *Id.* at 21a. USTC abandoned its "we didn't do it" defense, arguing instead that "the evidence presented at trial amounted to no more than 'insignificant' tortious behavior and acts of ordinary marketing services." *Id.* at 18a. USTC also argued that the district court abused its discretion by admitting testimony concerning Conwood's damages. *See id.* at 36a. The court of appeals affirmed.

a. Quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), the court explained that, "'[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary].'" Pet. App. 21a. Applying that standard to the evidence adduced at trial, the court found "ample documentary and testimonial evidence" to support the jury's verdict that "USTC's pervasive practice of destroying Conwood's racks and POS materials and reducing the number of Conwood facings through exclusive agreements with and misrepresentations to retailers was exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a.

The court first rejected USTC's claim that its acts were "isolated sporadic torts" that did not rise to the level of antitrust violations. *Id.* at 22a-23a. The court noted that USTC itself conceded that tortious activity can form the basis for liability under the Sherman Act as long as "that activity is pervasive and accompanied by other anti-competitive conduct." *Id.* at 18a. The court recited the extensive trial evidence and concluded that, "[c]onstruing the evidence in the light most favorable to Conwood, these incidents were neither sporadic nor isolated." *Id.* at 25a.

The court also rejected USTC's contention that retailers "alone, not USTC, determined and controlled what racks and POS were used in their stores." *Id.* at 26a. The court cited extensive evidence (including USTC's own documents) to support Conwood's allegation that USTC abused its power with retailers, as the monopoly provider of moist snuff, "to control the number of price value brands introduced in stores" (*id.*) and "to place USTC racks exclusively in retail stores and hide competitor products in its racks" (*id.* at 29a). USTC also made outright "misrepresentations to retailers to obtain exclusive vending" (*id.* at 29a-30a), and entered into tens of thousands of contracts that required retailers to eliminate space and advertising for rivals' products (*id.* at 12a).

The court further rejected USTC's complaint that the district court had erred in permitting the jury to consider legal conduct as commingled with illegal conduct: the court noted that "the district court properly instructed the jury that USTC could not be held liable for conduct that was part of the normal competitive process." *Id.* at 28a n.4 (citing *Aspen Skiing*, 472 U.S. at 604-05).

Finally, the court recited the testimony of USTC's Chairman Vincent Gierer, who acknowledged in cross-examination that his company had endorsed a "strategy of eliminating competitive distribution," which earlier in his testimony he had conceded was "not a legitimate goal." *Id.* at 29a. As the court summarized it, "Gierer essentially admitted that the activities about which Conwood

complains, particularly the misrepresentations to retailers to obtain exclusive vending, was not competitive conduct spurred by efficiency. Moreover, USTC has failed to offer any valid business reason for its representatives' pervasive destruction of Conwood racks." *Id.* at 29a-30a. Having found "ample" evidence of exclusionary conduct without any attempt to defend that conduct as efficient, the court upheld the verdict. *Id.* at 30a.

b. The court next rejected USTC's claim that Conwood had failed to prove harm to competition in the national moist snuff sales market. Citing the testimony of Professor Kamien, the court of appeals noted that, "as a result of USTC's exclusionary conduct, the consumer suffered by having to pay higher prices, and that there was less variety in the market." *Id.* at 33a. Kamien further testified that, "had there been true competition in the moist snuff market, USTC's market share, which dropped approximately 1 percent per year between 1979 and 1990, would have fallen much faster." *Id.* at 34a.

c. The court rejected USTC's contention that the district court had abused its discretion in allowing Professor Leftwich to testify on damages under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court noted that USTC did "not challenge Leftwich's qualifications as an expert, but only his testimony and damages study." Pet. App. 38a. The court then reviewed the *Daubert* factors to determine the reliability and relevancy of Leftwich's analysis. *Id.* at 38a-39a.

The court pointed out that Leftwich had used three methods to test Conwood's claims: a regression analysis, a yardstick test, and a before-and-after test. Those modes of analysis "are generally accepted methods for proving antitrust damages." *Id.* at 40a. The court rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act.'" *Id.* at 41a. Contrary to USTC's submission, Leftwich had taken "USTC's expert's own regression model" and used information from "sworn affidavits compiled from 241 Conwood sales representa-

tives detailing USTC's unethical activity in their areas" to construct "three alternate measures of USTC's bad acts by state." *Id.* The court concluded that Leftwich's regression analysis "accounted for all variables raised by USTC's own expert." *Id.* at 42a.

The court found no merit in USTC's objections to Rosson's damages testimony and to Leftwich's study on the grounds that they were too speculative and unlinked to the evidence of wrongdoing. The court noted that "[t]he jury was instructed that it could not award damages for injuries caused by other factors" and that "it is undisputed that USTC did not object to the jury instructions regarding damages." *Id.* The court thus "reject[ed] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors." *Id.* at 42a-43a. Accordingly, the court concluded that "there was sufficient evidence to support the jury's award of damages in this case" and that the jury's award was "well within th[e] range" of the $313-$488 million estimated by Conwood's witnesses. *Id.* at 43a.

USTC's petition for rehearing and rehearing en banc was denied. *Id.* at 45a. No judge voted in favor of rehearing or even requested a response.

REASONS FOR DENYING THE PETITION

I. USTC's admitted failure to object to the jury instructions leaves it with only a sufficiency-of-the-evidence challenge. In rejecting that challenge, the court below faithfully applied this Court's well-settled antitrust principles to the facts presented. The court carefully scrutinized a voluminous trial record and found "ample" evidence of USTC's extensive campaign of exclusionary conduct. That fact-bound determination does not conflict with any other court decision.

II. The court of appeals also properly concluded that the damages award comported with well-established antitrust and evidentiary standards. The unchallenged jury instructions required the jury not to award damages for lawful conduct. USTC's argument that the evidence was

insufficient to support a conclusion that the jury could have segregated lawful from unlawful conduct was carefully considered and rejected by the court below. In this Court, USTC largely repeats its attack on Conwood's expert without acknowledging – as the court of appeals pointed out – either that Conwood's expert performed the very analysis that USTC insists was necessary or that there was ample additional evidence (unchallenged by USTC) that supported the jury's award. USTC's fact-bound challenge presents no circuit conflict.

I. USTC'S SUFFICIENCY CHALLENGE WAS CORRECTLY REJECTED BY THE SIXTH CIRCUIT, WHICH APPLIED WELL-SETTLED PRINCIPLES OF ANTITRUST LAW TO THE EVIDENCE

USTC frames its first question as whether "misleading 'suggestions' and 'recommendations' to retailers" may be a basis for antitrust liability. Pet. i. But USTC does not dispute that there was extensive evidence of USTC's outright exclusion of its competitors' products and advertising. Nor does USTC suggest that *this* evidence was insufficient to support the verdict. Moreover, USTC did not object to the admission of evidence regarding its false and misleading statements to stores, and did not request a jury instruction or special verdict on this issue. Accordingly, USTC is left to argue that *part* of the trial evidence was insufficient to support the verdict. That argument falls of its own weight. *Aspen Skiing*, 472 U.S. at 604 (Court "must interpret *the entire record* in the light most favorable" to the prevailing party) (emphasis added). In any event, USTC is wrong to suggest that its fraudulent conduct – which it admitted served no legitimate purpose – was *per se* lawful, or that any court has so held.

A. The Properly Instructed Jury's Finding Of Exclusionary Conduct Was Based On Overwhelming Evidence

USTC concedes that the jury was correctly instructed under this Court's holdings that exclusionary conduct is "conduct that has the effect of preventing or excluding

competition or frustrating or impairing the efforts of other firms to compete for customers." C.A. App. 235 (Jury Instruction No. 2.4). The district court also properly instructed the jury that USTC could not be held liable simply for "supplying better products or services," or for conduct that "is part of the normal competitive process." *Id.* In reviewing the judgment at trial, the court of appeals expressly followed this Court's direction to "assume that the jury followed the court's instructions." *Aspen Skiing*, 472 U.S. at 604; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993).

As the court below correctly held, ample evidence supported the jury's finding that USTC impaired the opportunities of rivals and prevented competition on the merits. Representative statistics from the trial are illuminating:

– 122 representative USTC documents, many from senior executives, instructed USTC representatives in the field to prevent rival distribution and promotion, and monitored the success of the plan as it was implemented;

– 74 USTC sales representatives admitted in either testimony or trial exhibits that USTC had ordered them to choke rival distribution and promotion as a matter of corporate policy, and that they had followed that policy, often by simply removing competitors' products and displays from the stores;

– 600 specific and representative instances of exclusion from 22 states were admitted into evidence;

– Conwood was required, as a result of USTC's campaign, to replace 20,000 moist snuff sales racks *per month* after 1990 at a cost of $1.2 million annually;

– Conwood's more than 200 salespersons were required to spend *half* their work time attempting to restore Conwood racks, POS advertising, and products after USTC had excluded them from the stores;

– Conwood's presence in stores (measured by the number of slots or "facings" occupied by Conwood products)

was reduced on average from 7 facings to only 2 after a USTC representative visited a retail outlet;

– At least 21,000 retailers, including the nation's most significant chain outlets for moist snuff, were covered by USTC contracts that explicitly required exclusion of competitors' racks/POS/products; and

– At least 37,000 retailers, representing 80 percent of USTC's U.S. moist snuff sales, were covered by USTC contracts with features preventing free competition.[2]

That evidence proved USTC's direct exclusion of rivals' racks, products, and advertising, not just "misleading 'suggestions' and 'recommendations' to retailers." Pet. i.

In this Court, USTC contends that the evidence revealed only "legitimate business conduct" consisting of "aggressive nonprice competition that is integral to the everyday competitive process." Pet. 2. But at trial USTC never even attempted to offer "valid business reasons" for any facet of the exclusionary conduct challenged by Conwood, including its misrepresentations to retailers. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1992). *See also Aspen Skiing*, 472 U.S. at 605, 608-09 (excluding rivals on basis other than efficiency is anticompetitive). To the contrary, USTC "essentially admitted that the activities about which Conwood complains, *particularly the misrepresentations to retailers to obtain exclusive vending*, was not competitive conduct spurred by efficiency." Pet. App. 29a-30a (emphasis added). *See also* p. 5, *supra* (collecting cites). Confronted

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[2] This summary, contained with citations in Conwood's court of appeals brief (at 37-38), was captured in great part by the court of appeals' opinion. *See* Pet. App. 6a-15a. Yet even the court's opinion, rich as it is in reflecting the record in this case, necessarily only references a small part of the evidence presented during a month-long trial. Under the *Aspen Skiing* standard, this Court would be required to review the entire trial record – 6313 pages of testimony and 364 documentary exhibits – and satisfy itself that no reasonable trier of fact could have found USTC's conduct to violate Section 2 before it could reverse the court of appeals in upholding the district court's judgment for Conwood. *See Aspen Skiing*, 472 U.S. at 604.

by the evidence at trial, USTC simply denied that it had committed the acts that Conwood alleged to be illegal. The case was accordingly contested at trial on that basis, and USTC lost. It cannot now attempt to retry its case in this Court, based on an efficiency defense that it never asserted below.[3]

In any event, that defense has no merit. The court of appeals canvassed the evidence detailing the wide range of USTC's anticompetitive acts: entering into agreements that required stores to exclude competition; training its personnel to destroy or remove Conwood's products; misusing its position as category manager to exclude Conwood's advertising and racks and reduce its product facings; and misleading stores as part of an effort to gain their support for such exclusion. Pet. App. 23a-30a. The court correctly characterized that evidence as presenting "a systematic effort to exclude competition from the moist snuff market," and as sufficient to show that "USTC sought to achieve its goals of excluding competition and competitors' products by numerous avenues." *Id.* at 22a.

"It is not customary for this Court to review the sufficiency of the evidence." *Brooke Group*, 509 U.S. at 230. There is certainly no reason to do so here, where USTC does not even attempt to dispute that the record as a whole provides sufficient evidence of exclusionary conduct, and where USTC never even attempted to offer "valid business reasons" for any facet of that conduct. *Eastman Kodak*, 504 U.S. at 483.

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[3] Even USTC does not seek to offer any business justification for the pervasive and unauthorized rack removals. Instead, USTC suggests that the Court need not address the anticompetitive effect of those "simple torts" because they were improperly aggregated by the court of appeals with "procompetitive conduct." Pet. 18 n.11. But, as noted, USTC never objected to evidence of any of the conduct that it now strives to label as pro-competitive, never sought to present a business justification for that conduct, and never requested a jury instruction or special verdict on this issue. Accordingly, the exclusionary effect of all that conduct was properly considered by the courts below.

B. The Decision Below Does Not Conflict With Decisions Of Any Other Circuit

USTC asserts that the Sixth Circuit's holding on sufficiency of the evidence conflicts with the decisions of other circuits in two respects: (1) the standards for "nonprice competition" (Pet. 15-19), and (2) the requisite degree of "foreclosure" to support a Section 2 violation (Pet. 19-20). Particularly when viewed through the lens of USTC's failure to challenge the jury instructions and thus preserve an argument that the law requires something more than the existing settled standards under Section 2, the claims of "conflicts" are without foundation.

1. USTC asserts (Pet. 16) that this Court's guidance is needed because of an alleged conflict between the decision below regarding "nonprice competition" and "the analysis" of *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). But USTC did not challenge the jury instructions on this issue and thus cannot complain that the jury was wrongly instructed on the law. The court below simply decided that extensive evidence supported the jury's finding that USTC engaged in exclusionary conduct, based on the many witnesses and exhibits that demonstrated how USTC used its power in myriad ways to exclude its competitors' racks, POS advertising, and products, and because USTC had offered no procompetitive justification for *any* of the conduct challenged by Conwood. The Sixth Circuit found no contrary rule of law in *Stearns*, and there is none.

In *Stearns*, the court did not review for sufficiency an extensive trial record documenting varied forms of misconduct that the monopolist did not even attempt to justify. The Fifth Circuit considered, instead, a grant of summary judgment (for defendant manufacturer of airplane-to-airport gate bridges) where the defendant had allegedly misled airport buyers as part of a bidding competition with the plaintiff. The plaintiff's evidence all involved "fairly simple attempts [by the defendant] to generate sales by 'touting the virtues' of its bridges." 170

F.3d at 524. *That* conduct, alone, was insufficient as a matter of law for Section 2 liability, the Fifth Circuit held, because even a monopolist can attempt to sell its own products to customers "by vigorously stressing the qualitative merits of its product." *Id.* at 526.

Nothing of the sort is at issue here. Rather than stress the merits of its products, USTC abused its power to prevent others from having the chance to sell theirs. As its executives testified, USTC already had ample room to sell, display, and "tout the virtues" of its own products in stores. C.A. App. 703-04, 941-43, 961, 1592-94. The conduct challenged at trial was not conduct claimed by the monopolist, as in *Stearns*, to be rational, pro-competitive efforts to convince the customer to take its products over the plaintiff's. Nor was it, as USTC now wishes to pretend, mere "recommendations" or "suggestions" as to what stores should do. The evidence showed that USTC itself excluded competitors' racks, POS, and products, and that it either coerced or misled retailers into going along with that exclusion. USTC defended against that evidence by denying that it had engaged in such exclusion; but it freely admitted that this conduct had no legitimate purpose. Pet. App. 29a-30a. Accordingly, the extensive record before the Sixth Circuit was almost the exact opposite of the narrow issue addressed by the Fifth Circuit on review of summary judgment in *Stearns*. Both courts, moreover, reached their conclusions by applying the same standards from *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and *Aspen Skiing*. *Compare* 170 F.3d at 522-23 *with* Pet. App. 19a-20a.[4]

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[4] USTC is also incorrect (Pet. 17) in asserting a conflict with decisions of the Seventh and Eighth Circuits. Those decisions do not even address "nonprice competition" under Section 2. For example, in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000), the court rejected a claim that price discounting violated antitrust laws because, "[i]n the absence of predatory prices, any losses caused by pricing 'cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct.'" *Id.* at 1061 (footnote omitted). As the court there stressed, "[a] Section 2 defendant's

Nor should this Court depart from its normal certiorari standards to consider USTC's generalized complaint (Pet. 18) that the Sixth Circuit's ruling provides "no standard to guide courts or competing firms on the boundary between lawful competition and illegal exclusionary conduct or the criteria that should be applied in evaluating the dominant firm's marketplace conduct." The jury instructions derived directly from this Court's cases and were accepted by USTC as properly stating the law applicable to this case. USTC did not seek any additional "guidance" for the jury on the line between lawful competition and illegal exclusionary conduct. Nor can USTC plausibly claim any uncertainty by the jury, where it freely admitted that all of the conduct about which Conwood complained – including "misrepresentations to retailers to obtain exclusive vending" as well as the removal of racks, POS, and products – was illegitimate and should not have occurred. Pet. App. 29a-30a. In light of USTC's failure to object to the jury instructions, and its admissions that the alleged conduct had no competitive justification, this case

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proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits." *Id.* at 1062. The manufacturer's justification for cutting prices in *Concord Boat* – to increase sales of its products – thus contrasts markedly with USTC's unjustified and multi-faceted nonprice campaign, which was designed to prevent competitors from selling *their* products and in particular to prevent price competition from half-priced brands.

Likewise, there is no conflict (*see* Pet. 17) with *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280, 1288 (7th Cir. 1982), a Sherman Act Section 1 case in which an automobile dealer complained that a local dealer's association refused to admit it as a member. The court rejected the plaintiff's claim because the "plaintiff has made no showing that membership in the defendant Association is necessary (or even desirable) to compete effectively as a Datsun dealer." *Id.* at 1286. And, in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (*see* Pet. 16 n.8), the court rejected a claim that price discounts and noncancellation clauses with "legitimate business considerations" were anticompetitive means of maintaining monopoly power. 724 F.2d at 236.

could not serve as a vehicle for any general exploration of the line between lawful and unlawful nonprice conduct.[5]

2. USTC asserts (Pet. 19) that the court below "relieve[s] plaintiff of any foreclosure requirement" and thus supposedly conflicts with the decisions of four circuits. That contention, however, ignores that USTC sought no jury instruction on its current foreclosure theory, and thus cannot now complain that the jury was not asked to find that a particular percentage of the moist snuff market was foreclosed to competition. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

Nor, in any event, is USTC's view the law. The Sixth Circuit invoked *Aspen Skiing* to explain that, "whether conduct may be characterized as exclusionary, 'it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.'" Pet. App. 21a (quoting 472 U.S. at 605). The jury here was instructed to consider the impact of USTC's campaign on competition and consumer choice. As the court of appeals explained, the evidence not only showed that USTC engaged in "exclusionary conduct without a

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[5] While taking no position on whether USTC engaged in exclusionary conduct in violation of Section 2, *amicus* American Wholesale Marketers Association asks the Court to grant the petition to explain "what trade practices shall be acceptable, reasonable, and appropriate in the convenience store chain of trade" (Br. 2). But (1) this Court does not give advisory opinions; (2) AWMA's suggestion that the Sixth Circuit has called into question such common practices as the use of racks, point-of-sale advertising, category managers, and promotional allowances is blatantly incorrect (*see, e.g.*, Pet. App. 28a); and (3) AWMA fails to recognize the well-accepted principle that a monopolist exercising market power to exclude competitors without competitive justification may be held liable under Section 2 when a non-monopolist engaged in similar conduct could not. *See United States v. Microsoft Corp.*, 253 F.3d 34, 57-58, 72 (D.C. Cir.) (en banc) (per curiam), *cert. denied*, 122 S. Ct. 350 (2001).

sufficient justification," it also demonstrated that "USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a. USTC does not challenge the jury's finding on that point, which itself was supported by substantial evidence. *Id.* at 33a (citing evidence that USTC's conduct harmed consumers by limiting variety and raising prices). *See also* pp. 4-6, *supra* (citing record sources).

The cases cited by USTC do not establish a foreclosure requirement under Section 2. Curiously, USTC cites *United States v. Microsoft Corp.* But there the D.C. Circuit *rejected* a specific foreclosure threshold. The court explained that a Section 2 violation does not require proof of any particular percentage of foreclosure, but rather that "the monopolist's conduct indeed has the requisite anticompetitive effect." 253 F.3d at 58-59 (citing *Brooke Group*, 509 U.S. at 225-26). *Cf.* Pet. App. 33a (discussing *Brooke Group* in context of exclusionary effects in growing market). It then upheld a claim for monopoly maintenance where the monopolist had engaged in a wide range of anticompetitive acts even though the government could not establish what direct effect any of those acts individually had on foreclosing competition but where the sum total of Microsoft's anticompetitive campaign maintained its monopoly power.[6]

Similarly, in *Barry Wright*, the court upheld a district court's judgment for the defendant, finding that the evidence presented did not establish "exclusion" from contracts that required a manufacturer to sell its products at a specially low price in exchange for the buyer's agree-

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[6] In the passage cited by USTC, the court explicitly rejected the claim that the "roughly 40% or 50% share usually required to establish a § 1 violation" based on the "monopolist's use of exclusive contracts" was necessary to "give rise to a § 2 violation." 253 F.3d at 70. Here, in any event, the evidence supported a finding that USTC had contracts that alone – and without reference to the other forms of misconduct proved at trial – prohibited fair competition with retailers accounting for 80 percent of its sales (Pet. App. 12a), which in turn consists of 61.6 percent of the U.S. moist snuff market. Thus, even by Section 1 standards, substantial foreclosure was established. 253 F.3d at 70.

ment to take nearly all of its requirements from that seller. 724 F.2d at 236-37. In rejecting a competitor's Section 2 claim, the court explained that the evidence did not establish "the severity of the foreclosure (a fact which, other things being equal, suggests anticompetitive harm)." *Id.* at 237. Thus, in *Barry Wright*, "severity of foreclosure" was simply an evidentiary factor in establishing whether the monopolist had engaged in anticompetitive conduct – it was not a stand-alone requirement for a Section 2 violation, as USTC appears to assert (Pet. 20). And, even if that *is* what the First Circuit intended, USTC failed to preserve this argument through an objection to the jury instructions. *See* Pet. App. 53a-54a.

Nor is the decision below in conflict with *Concord Boat* (207 F.3d at 1044-45). That court held that the alleged predatory conduct was legitimate price competition that helped consumers and that the defendant monopolist did nothing to prevent the plaintiff from offering a better deal. The court further noted that the challenged agreements did not even require exclusive dealings with the monopolist, but rather permitted purchasers to buy up to 40 percent of their requirements from other sellers without forgoing the discount offered by the monopolist. On those facts – without even looking at the share of the total market covered by those agreements – the Eighth Circuit found no exclusion, a factual conclusion that does not conflict in any way with the Sixth Circuit's affirmance of the district court in this case. *See, e.g., United States v. Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred.").[7]

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[7] USTC's reliance (Pet. 20) on *Western Parcel Express v. United Parcel Service of America, Inc.*, 190 F.3d 974, 976 (9th Cir. 1999), is also misplaced. That case concerned whether the defendant had market power (*see id.* at 975) – an issue uncontested by USTC in this case.

II. USTC'S SUFFICIENCY CHALLENGE TO THE DAMAGES EVIDENCE LACKS MERIT AND RAISES NO CONFLICT WITH ANY CIRCUIT

A. USTC Has Failed To Preserve Any Legal Issue Regarding Damages For The Court To Review

In the court of appeals, USTC contended that the district court had erred under *Daubert* by admitting the testimony of Conwood's damages expert, Professor Richard Leftwich. In this Court, USTC has abandoned its challenge to the lower courts' application of *Daubert*, thus conceding that Leftwich's testimony was properly admitted. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992) (questions not framed in the petition for writ of certiorari are deemed waived).

Instead USTC complains, first, that Conwood failed to "disaggregate" legal from illegal conduct in its proof of damages and, second, that Conwood failed to "link" its antitrust damages to specific antitrust misconduct.

On the first issue, USTC fails to acknowledge that the jury in this case was specifically instructed to separate lawful from unlawful conduct in calculating damages: "[y]ou may not . . . calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors." C.A. App. 243 (Jury Instruction No. 4). As the Sixth Circuit recognized, a reviewing court "must assume that the jury followed the court's instructions." *Aspen Skiing*, 472 U.S. at 604. The jury must, therefore, be presumed to have "disaggregate[d] the injury caused by USTC as opposed to that caused by other factors." Pet. App. 42a-43a.

To the extent USTC suggests that the instruction given to the jury was insufficient and some additional legal instruction should have been given, that argument was not presented to the district court at trial and is, thus, waived. *E.g., Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 (1990) (any "possible flaw in the jury's calculation of the

amount of damages would not be an appropriate basis for" overturning verdict in absence of challenge to jury instructions). It is also incorrect. The damages instruction given by the district court was perfectly in keeping with the damages requirements imposed by this Court in other antitrust cases.[8]

On the second issue, USTC asked for no instruction requiring the jury to trace each dollar of antitrust damages to specific instances of antitrust misconduct. Nor could it have; USTC cites not a single case in which a court has accepted such a requirement, much less a dispute about this in the lower courts. USTC cannot ask for review in the Court based on an instruction it did not request and could not properly have gotten.

B. Overwhelming Evidence Supported The Properly Instructed Jury's Damages Award

Because USTC failed to preserve any legal issue concerning the jury instructions (or the admissibility of any damages evidence), the only possible issue before this Court is whether all the evidence, viewed in the light most favorable to Conwood, was sufficient to support the jury's finding. But this Court's cases make absolutely clear that it does not sit to review the sufficiency of the evidence. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In particular, the Court has stressed that evidence on antitrust damages should not be reweighed on appeal. *Texaco*, 496 U.S. at 573.

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[8] *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("[i]t is enough that the illegality is shown to be a material cause of the injury"); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (noting the "well settled principle" that, "in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs").

In any event, USTC does not even purport to confront *all* the record evidence on damages. USTC criticizes Leftwich's testimony, but it does not contest the other evidence on damages. Moreover, USTC mischaracterizes Leftwich's testimony. As the court of appeals found, Leftwich did carefully rule out causes of Conwood's damages other than USTC's exclusionary conduct. While USTC finds that testimony unpersuasive, the question was properly submitted to a jury, which found the testimony credible.

1. USTC's petition directs its fire on disaggregation solely at the economic study performed by Professor Leftwich. USTC simply ignores (Pet. 21-23) the *other* witnesses on damages, whose testimony the Sixth Circuit found independently sufficient to support the jury verdict. Pet. App. 42a-44a. In "reject[ing] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors," *id.* at 43a, the court found that three different witnesses placed the damages range between $313 million and $488 million for the multi-year period in which USTC's illegal campaign harmed Conwood, *id.* at 43a-44a.

As previously explained (pp. 6-8, *supra*), the jury heard evidence from two Conwood executives, each with decades of experience in the smokeless tobacco market, who testified that, absent USTC's unlawful campaign, Conwood's market share would have been in the mid-20s. Pet. App. 15a-16a, 42a-43a. That testimony was based not only on their experience, but also on Conwood's market share growth in the years before USTC commenced its violations, Conwood's performance in the most closely analogous market (loose leaf), and Conwood's performance in local areas where it had a significant presence before USTC began its campaign to exclude. *Id.* This testimony was supported by USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising were not excluded, Conwood's share was around 25 percent. C.A. App. 1787, 1796-97, 1874, 4809.

Based on the undisputed figure of $10 million per market share point in additional profit, *see* Pet. App. 15a, this evidence supported Conwood's claim to at least $400 million in lost profits in the four years preceding trial arising solely from USTC's challenged anticompetitive conduct.

2. Even if USTC could view Professor Leftwich's evidence in isolation, his study plainly did disaggregate lawful from unlawful conduct. Using accepted statistical methods, Leftwich tested Conwood's assertion that its growth had been stymied by USTC in states where it had not established a foothold before USTC began its exclusionary campaign. Leftwich testified that there was a statistically significant difference between Conwood's growth after 1990 (when USTC began its campaign) in foothold and non-foothold states, and that Conwood's diminished growth could not be explained by any factor *except* USTC's challenged anticompetitive conduct.

For example, in his before-and-after test, Leftwich found that, prior to the exclusionary campaign, there was no relationship between Conwood's foothold status and market share growth rate, but that, after USTC's campaign had begun, there *was* a significant relationship between Conwood's share of the moist snuff market in a state and the rate of growth in that state. *Id.* at 41a.

In his yardstick test, Leftwich disproved claims that aggressive competition by USTC, lack of innovation by Conwood, or advertising restrictions caused the growth differential by comparing Conwood's performance in the moist snuff market to its performance in the closely analogous loose leaf tobacco market. Leftwich noted that, in loose leaf, Conwood competed with the same sales force, there was no more or less innovation, and the same advertising constraints applied in precisely the same stores. Yet in the loose leaf market, where USTC did not compete, Conwood was able to achieve market growth in all states, including those where it did not begin with a relatively high share. *Id.* *See also* C.A. App. 1106-08.

In his initial regression analysis, Leftwich considered an array of additional hypotheses for Conwood's stunted growth in non-foothold states and found that none could explain Conwood's losses. *See, e.g.*, C.A. App. 1104-09 (testimony), 3517-28 (expert report), 4412-13 (expert rebuttal report). To confirm further that Conwood's losses were attributable to USTC's unlawful conduct, Leftwich performed an additional regression, based on a model developed by USTC's own expert. Pet. App. 41a. As the Sixth Circuit noted, Leftwich employed nationwide sales data and sworn declarations from 241 Conwood sales representatives regarding the extent and relative intensity of USTC's challenged conduct in their territories and used this information "to construct three alternate measures of USTC's bad acts by state." *Id.* Leftwich found that "increases in UST's exclusionary behavior in a state *reduce* Conwood's share of sales in stores in that state by a statistically significant amount." C.A. App. 4415-16 (expert rebuttal report). The Sixth Circuit thus expressly rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act.'" Pet. App. 41a.

USTC claims that Leftwich calculated damages as one "ball of wax" and accordingly admitted that he swept legal and illegal conduct alike into his opinion. Pet. 23. In fact, Leftwich testified only that all of the *unlawful* conduct went into his calculation, with no attempt to assign specific figures for separate rack removals, contracted exclusions, or other kinds of exclusion. Because his analysis identified USTC exclusionary conduct of all kinds as the only explanation for Conwood's stunted growth in the non-foothold states, Leftwich did limit his damages estimate to the effect of USTC's unlawful conduct. USTC has cited no authority for its claim that Leftwich was required to disaggregate damages due to each species of unlawful conduct, much less each instance of exclusion.

In short, Leftwich considered and ruled out all of the alternative "explanations that USTC's own expert suggested as possible explanations for Conwood's low market

share," Pet. App. 40a-41a, and proved a direct link between increases in USTC's anticompetitive conduct and Conwood's lost share. His testimony was subjected to vigorous cross-examination, yet USTC offered no contrary evidence (other than to present an expert to argue that Conwood had suffered no damages). It was up to the jury to weigh the evidence, and its award of $350 million was consistent with this Court's decisions. *See, e.g., Zenith*, 395 U.S. at 116-19 (evidence as to what market share would have been in the absence of antitrust injury sufficient to sustain verdict); *Bigelow*, 327 U.S. at 264 (comparison of plaintiff's receipts before and after defendant's unlawful actions was sufficient to support jury's verdict).

USTC complains about the imprecision of the proof regarding the substantial damage caused by its unlawful corporate policy of abusing its power to harm competition without ever having offered a better way to calculate damages. Whatever uncertainty might exist in the calculation of damages, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265.[9]

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[9] USTC repeatedly notes the size of the damages award, as if that alone were a ground for certiorari. But "[t]he size of the damages award . . . confirms the substantial character of the effect of" USTC's anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 608. USTC's focus on the amount of the award after trebling is inappropriate. Congress has determined that antitrust awards should be trebled, and an attack on the trebled number is an attack on that statutory policy, not on the jury's assessment of injury. Accordingly, the amount awarded prior to trebling, $350 million, is the amount relevant to USTC's suggested analysis. When viewed from the perspective of 1 percentage point of market share equaling $10 million per year in lost profits, the $350 million awarded is in fact a conservative number (representing the loss of less than 9 market share points over a four-year period preceding trial). Pet. App. 15a. The court below thus reasonably concluded that the jury award was "well within that range" of evidence on damages. *Id.* at 43a. We would also note that USTC itself has characterized the award as "not expected to have a material adverse effect on [USTC's] consolidated financial position." UST Inc. SEC Form 10-Q (3d Qtr. 2002).

C. USTC's Suggestion Of A "Conflict" On Damages Is Incorrect

USTC alleges numerous conflicts on the issue of damages. None is remotely convincing. As an initial matter, most of the cases cited by USTC are *Daubert* cases dealing with the "gatekeeper" function of the court in admitting expert testimony, not with an analysis of the sufficiency of properly admitted evidence. As noted, USTC has waived its *Daubert* challenge in this Court. Moreover, because USTC failed to preserve any legal issue concerning the standard considered by the jury, this case involves only the fact-bound application of undisputed legal principles. USTC cannot identify any controlling legal principle on which the lower courts disagree.

In *Concord Boat*, the expert "construct[ed] a hypothetical market which was not grounded in the economic reality" of the market at issue; assumed that the plaintiffs' products were of the same quality as the defendants' (when they were not); assumed (for no particular reason) that antitrust damages would begin when one firm reached 50 percent; assumed that, in his entirely fictive market, prices would be set in accordance with an academic theory ("Cournot model") that had never been held a valid method for estimating antitrust damages; and, then, from those compounded assumptions – none anchored in the facts – predicted substantial damages. 207 F.3d at 1056. Worse still, the expert's assumptions concededly were contradicted by "inconvenient evidence." *Id.* The expert admitted that he had "failed to account for market events that both sides agreed were not related to any anticompetitive conduct," even though "such facts could have been incorporated into his model." *Id.* Not a single one of those glaring errors can be found in the damages evidence below. Both the Eighth and Sixth Circuits applied the exact same standard to the evidence – in *Concord Boat*, the expert failed to ground his opinion in the facts; in this case, he did. USTC's claimed conflict is therefore illusory.

In *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), the court specifically noted that the plaintiff made no effort to "segregate damages attributable to lawful competition from damages attributable to Kodak's monopolizing conduct." *Id.* at 1224. Here, the courts below in no way challenged this principle, but simply determined, on this record, that there *was* an adequate basis in the record by which the jury could limit damages to unlawful conduct. Pet. App. 43a. Once again, the courts of appeals are in agreement on the proper standards, and USTC complains only about the fact-bound application of settled law to its case.

The Sixth Circuit's rulings are not at all inconsistent with *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court there concluded that the district court had not abused its discretion in excluding the testimony of experts whose analyses "were so dissimilar to the facts presented in this litigation." *Id.* at 144-45. In this instance, using precisely the same standard of review articulated in *Joiner*, the court of appeals found that the damages testimony was properly tied to the facts of this litigation. Pet. App. 41a-42a.

Nor is there a conflict with Eighth Circuit decisions. In *Blue Dane Simmental Corp. v. American Simmental Association*, 178 F.3d 1035 (8th Cir. 1999), the court held that the district court had not abused its discretion in excluding inherently implausible expert testimony, where the expert declined to consider other concededly relevant factors and attributed the entire reduction in price for Risinger cattle in an already falling market to the introduction of 19 head into a purebred market of 138,169 animals. Here the court of appeals found exactly the opposite: "no reasoned basis" to overturn the district court's admission of Leftwich's testimony. Pet. App. 39a; *see also id.* at 40a-41a. Leftwich was "subject to vigorous cross examination and an opportunity for [USTC] to introduce countervailing evidence of its own." *Id.* at 42a. USTC

simply does not like the results of that process. There is no basis for USTC's assertion that this issue would have been decided differently in the Eighth Circuit. [10]

* * *

USTC asks this Court to undo the verdict of a properly instructed jury in an error-free, month-long trial in which voluminous testimony was adduced on a wide-ranging, comprehensive scheme to exclude Conwood's products from fair competition. Its sufficiency-of-the-evidence challenges, however, present no legal issue in conflict with the decisions of this or any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] Underscoring the absence of any split between the Sixth and Eighth Circuits, in a more recent decision not cited by USTC, *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739-40 & n.5 (8th Cir. 2000), the Eighth Circuit itself expressly confirmed its traditional view that a damages expert need not rule out all other possible causes of a plaintiff's injuries to be admissible.